IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION NO.230 OF 2003.

1. Smt. Silaba D'Souza,
   major in age,
   Teacher, resident of
   Maleanavaddo, Biunca,
   Cuncolim, Salcete,
   Goa, and her husband:

2. Shri Lulu K. D'Souza,
   major in age, Seaman,
   resident of Maleavaddo,
   Biunca, Cuncolim, Salcete,
   Goa. ... Applicants.

VERSUS

1. Shri Benedito Giratur D'Souza,
   aged 65 years, retired seaman,
   resident of Biunca, Cuncolim,
   represented by his Attorney,
   his son, Shri Wilton D'Souza,
   resident of Biunca, Cuncolim,
   by virtue of General Power of
   Attorney dated 17th April, 1975.

2. Felizmina D'Souza, major
   in age, housewife,
   resident of Biunca, Cuncolim. ... Respondents.

Mr. C.A. Coutinho, Advocate for the Applicants.

Mr. A.F. Diniz, Advocate for the Respondents.

CORAM: A. M. KHANWILKAR, J.

DATE: 7TH NOVEMBER, 2003.

ORAL ORDER:

Heard both sides.

This application is moved by the applicants for interim relief during the pendency of the Second Appeal. The Second Appeal has been admitted vide Order dated 21st August, 2003. Counsel for the respondents in this application contends that the order as passed on 21st August, 2003 does not clearly formulate substantial questions of law for which reason that Order will have to be ignored being improper. He further submits that the question as referred to in the Order dated 21st August, 2003 does not arise for consideration in the present appeal. On this contention, learned counsel submits that not only the stay application be dismissed, but even the order passed on 21st August, 2003 admitting the Second Appeal deserves to be recalled and the Second Appeal be dismissed.

2. As mentioned earlier, the present application has been moved by the applicants for interim relief during the pendency of the appeal. As grievance has been made in this application on behalf of the respondents that no substantial questions of law have been formulated while admitting the appeal and the question as referred to in the Order dated 21st August, 2003 in fact does not arise for consideration in this appeal, to my mind it will be apposite to reproduce the Order dated 21st August,

2003 in its entirety:-

> " Heard.
>
> Perused the proceedings.
>
> S.A. is admitted in view of the perversity of findings recorded in the face of clear admission of the plaintiffs that there is another path way to reach their property, which fact was specifically pleaded by the defendants. "

3. On the other hand, according to the learned counsel for the applicants, the Order as passed above is in fact accepting the substantial questions of law as formulated in terms of clause (B) in paragraph 7 of the appeal memo which reads thus :-

> " (B) Whether a permanent injunction could be granted in respect of a access claimed by the plaintiffs on the sole ground that it was the only access to the plaintiffs property, when admittedly there is a public road touching the plaintiffs property".

4. He therefore submits that there is no substance in the argument that the appeal has been admitted without framing the substantial questions of law. To my mind, there is force in the argument advanced on behalf of the appellants. Indeed, the order as passed on 21st August, 2003 has not articulated the question as posed by the appellants in Clause (B) of paragraph 7 of the Memo of appeal as referred to above, but in substance the learned Judge while admitting the appeal was prima facie convinced that the said question will arise for consideration. Understood thus, it is not a case of no substantial question of law framed by the Court while admitting the appeal as such.

5. The next grievance of the respondents is that the said question does not arise for consideration. That aspect can be gone into at the stage of final hearing of the appeal, for it is well settled that it is open for the respondents to take such plea even at the time of final hearing of the appeal.

6. In the circumstances, that argument need not detain this Court while considering the stay application filed on behalf of the appellants. In the circumstances, I see no reason to accept the

objection taken on behalf of the respondents at this stage. Accordingly I will now proceed to decide the stay application on its own merits.

7. To my mind, as the appeal has been admitted, it presupposes that a prima facie case has been made out by the appellants, the appropriate course is to direct the parties to maintain status quo as it obtained during the pendency of the proceedings before the Courts below. That would serve the interest of justice between the parties.

8. Accordingly the application is disposed of with direction to the parties to maintain status quo as it obtained during the pendency of the proceedings before the Courts below. Order accordingly.

A.M. KHANWILKAR, J.

sl.